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In The

Supreme Court of the United States

October Term, 1977

Supreme Court, U. S.
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Nos. 77-25
77-37
77-42

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

-and-

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

-and-

AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all other similarly situated,

Respondents,

-and-

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents in Support of Petitions.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REPLY BRIEF FOR PETITIONERS FLAGG BROTHERS, INC., and HENRY FLAGG

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AMERICAN WAREHOUSEMEN'S ASSOCIATION and THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,
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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS FLAGG BROTHERS, INC. and HENRY FLAGG

INTRODUCTORY STATEMENT

Petitioners, FLAGG BROTHERS, INC. and HENRY FLAGG, submit this brief in reply to the brief for respondents.

ARGUMENT

I.

THE CASES RELIED UPON BY RESPONDENTS DO NOT SUPPORT THEIR POSITION THAT STATE ACTION EXISTS IN A WAREHOUSEMAN'S LIEN SALE.

A. *Parks v. "Mr. Ford"*, 556 F.2d 132 (3d Cir., April 4, 1977).

Respondents' strong reliance upon *Parks* is misplaced. Contrary to repondents' assertion that the sale provision of the Pennsylvania garageman's lien law is a statute "virtually identical to the contested statute herein" (Brief for Respondents at 17, n.), the differences between the statutes are significant and compelling. The Pennsylvania statute entwines the Commonwealth jointly in concert with the garageman in performing acts authorized under the statutory scheme. There is no mistaking the "imprimatur" of the state upon the conduct of the private party because there is not only active participation by the state but the accrual of a monetary benefit to the state as a direct result of the challenged activity.

The Pennsylvania statute provides that:

1. The sale takes place "in the same manner as personal property is sold by sheriff or constable." Pa. Stat. Ann. Tit. 6, §12 (1963).

2. The sale is "as conclusive to the title conveyed as if sold by a sheriff or constable." Pa. Stat. Ann. Tit. 6, §14.

3. The sale proceeds which exceed the amount of the lien and expenses if not demanded within six months after date of the sale *must be deposited* with the county treasurer *and credited* to the general revenue fund of the county. The owner may reclaim within three years of the date of deposit. Pa. Stat. Ann. Tit. 6, §13.

In addition to the statutory requirements the State Motor Vehicle Bureau upon application of the foreclosing garageman issues a certificate of title in the name of the lien holder (see the concurring opinion of Gibbons, J., in *Parks* at 158).

State participation and command set forth in the Pennsylvania statute is in sharp contrast to the absence of a state official and the permissiveness set forth in N.Y.U.C.C. §7-210. Pennsylvania directs a garageman to follow sales procedures of a sheriff. N.Y.U.C.C. §7-210 does not.[1] Pennsylvania decrees the effect of the sale to be as conclusive as a sheriff's sale; N.Y.U.C.C. §7-210 does not.[2] Pennsylvania bestows a direct pecuniary benefit upon the state by commanding deposit of an overage realized upon the sale if demand is not made by the owner within 6 months, thus giving

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1. The warehouseman's lien foreclosure statute imposes at least five procedural steps of which not one finds its counterpart in a sheriff's execution under Article 52 of the N.Y.C.P.L.R.: (1) advance notice to the depositor in a manner reasonably calculated to assure that notice will be actual. *Cf. Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314-15 (1950); (2) a minimum 26-day waiting period between notice and sale; (3) sale at a specified place; (4) advertisement of the sale by newspaper publication; (5) requirements as to how the sale may be conducted and to whom, indicating the warehouseman is a fiduciary agent for the depositor to protect the latter's equity, *Milford Packing Co. v. Isaacs*, 90 A.2d 796 (Del. Super. Ct. 1952). This is unlike a sheriff who is the agent throughout, and, as necessary, the strong right arm of the government, for the creditor party.

2. Under N.Y.U.C.C. §7-210(5) if the warehouseman sells in bad faith to other than a bona fide purchaser the sale is not final as to the depositor and he may replevy his property. *See* C.P.L.R. §§7101 *et seq.*

the county the use of that money for 3 years and ownership thereafter if the owner does not claim the money within 3 years; N.Y.U.C.C. §7-210 does not have any such provisions.[3] Pennsylvania was thus in a "symbiotic relationship" with the garageman since it could derive a benefit from the sale of the vehicle, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

The commands of the sale provision of Pennsylvania garageman's lien law plus the active participation by the State Motor Vehicle Bureau in the final act of divesting title of the owner and placing title in the name of the garageman render the *Parks* case totally different than the case at bar. Respondents' claim that *Parks* supports their position is without foundation.

In closing out the discussion of *Parks* it should be noted that the Pennsylvania garageman's lien sale provision when measured in a due process sense fails to approach the safeguards of N.Y.U.C.C. §7-210.

N.Y.U.C.C. §7-210(2)(b) requires notification in person or by registered or certified letter; the Pennsylvania statute merely

3. In fact there is authority that §7-210 prohibits a warehouseman from selling more goods than necessary to satisfy his lien, any incidental overage to be held by the warehouseman. 93 C.J.S., "Warehousemen" §69 at 506; *Jesurun v. Kent*, 47 N.W. 784 (Minn. Sup. Ct. 1891); N.Y.U.C.C. §7-210(6).

The depositor can always sue to enjoin a sale using routine civil procedure. C.P.L.R. §§6301 *et seq.*; 12 Carmody Wait 2d, "Injunctions" §§78:27, 49 (1966); Brief of proposed Amicus Curiae New York State Consumer Protection Board, at 7 (citing *Knox v. DeCarolis Moving and Carting Co.*, No. 8941/75 (Sup. Ct. Monroe Cty. 1975), in which a preliminary injunction issued to enjoin a sale). As to the contention that issuance of preliminary injunctions are conditioned upon posting bond and that judgment bonds cost money, *see* C.P.L.R. §1101(a); N.Y. City Civ. Ct. Act §2102, Uniform City Ct. Act §2102, in 29A, pt. 3 McKinney's Con. L. of N.Y. Ann., "Judiciary" 275-76 and pocket supp. 1977-78 at 224 (*in forma pauperis* provisions allowing litigant to have the costs, fees and expenses necessary to prosecute an action waived).

requires notice in writing (Pa. Stat. Ann. Tit. 6, §11). N.Y.U.C.C. §7-210(2)(e) requires the sale to be held at the nearest suitable place to where the goods are stored; the Pennsylvania statute does not qualify in any way the place of sale. N.Y.U.C.C. §7-210(9) provides liability for damages or conversion liability for failure to comply with sale requirements; the Pennsylvania statute does not. *See Grafstein v. A. Santini Storage Co.*, ___ Misc. ___, 26 N.Y.S.2d 125 (N.Y. City Ct., N.Y. Cty.), *aff'd*, 180 Misc. 673, 42 N.Y.S.2d 496 (App. T. 1st Dept. 1941), *see also*, N.Y.U.C.C. §7-204(2).

Parks and the Pennsylvania garagemen's lien law cannot be the measuring rod of N.Y.U.C.C. §7-210 for state action or due process purposes.

B. *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 347 N.Y.S.2d 170 (1973).

Respondents' reliance upon *Blye* for the proposition that the law of New York recognizes the enforcement of a lien by sale as a traditional function of the sheriff is incorrect. The enforcement by sale was not in issue (N.Y. Lien Law §200). The lien of the innkeeper arising from his seizure of the guest's belongings was declared to be state action (N.Y. Lien Law §181). The sale provision of the New York Lien Law was not before the New York Court of Appeals and was not addressed in its decision. It is clear that the concern of the New York Court was directed toward the seizure:

> ". . . we note that plaintiff's property was not *seized* by a State official, but by private persons — i.e., hotel personnel, acting pursuant to State law. The threshold question is, therefore, whether the requisite 'State Action' is present."

Blye, supra, 33 N.Y.2d at 19, 347 N.Y.S.2d at 174. (Emphasis added.)

Lien enforcement insofar as it relates to a sheriff's function is comprised of two elements, first the seizure and ancillary to that the sale. In characterizing "execution of a lien" as the function of a sheriff the court was only concerned with the seizure aspect and not sale. Of the three types of civil enforcement procedures mentioned by the New York Court of Appeals, two of them, prejudgment attachment of property, C.P.L.R. Art. 62, and provisional replevin under the same Art. 62, do not involve a sale or other liquidation of property, but only its seizure and detention pendente lite. See C.P.L.R. §§314(3), 5230(a), 6201, subds. 1 and 2; N.Y. Lien L. §207. Moreover, *Blye* erroneously relies upon *Classic v. United States,* 313 U.S. 299 (1941) which did not involve "state action" and which only held that official conduct in abuse of statutory authority is conduct taken "under color of" state law. *Cf. Monroe v. Pape,* 365 U.S. 167 (1961).

The Supreme Court is not bound to the *Blye* characterization to any degree, and deferral thereto would be singularly inappropriate in this case. It is a basic rule of federal-state comity that "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism," state decisions upon a federal common law question are not conclusive and the substantive law ultimately governing is case law interpretation fashioned by federal courts. *Illinois v. City of Milwaukee,* 406 U.S. 91, 105 and n. 6 (1972); *Textile Workers' Union v. Lincoln Mills,* 353 U.S. 448, 456-57 (1957).

The need for a uniform rule of decision as to whether a warehouseman's lien sale is equivalent to a function of sovereignty, is aptly illustrated by the conflicting decisions in the Eighth and Ninth Circuits on this precise issue. *Compare Cox Bakeries of North Dakota, Inc. v. Timm Moving & Storage, Inc.,* 354 F.2d 356 (8th Cir. May 12, 1977) (public function in North Dakota, hence state action) *with Melara v. Kennedy,* 541 F.2d 802 (9th Cir. 1976) (not a public function, in California, state action not found). With federal and state courts

increasingly relying upon the public function analysis of state action in the area of creditor remedies as dispositive of the threshold issue of the applicability of the Fourteenth Amendment, *see Parks v. "Mr. Ford", supra,* 556 F.2d at 138-142; *Sharrock v. Dell Buick-Cadillac, Inc.,* 56 A.D.2d 446, 393 N.Y.S.2d 166 (2d Dept. March 28, 1977), the need becomes overriding for a uniform interpretation of "function of sovereignty" in place of present state-by-state analysis, whereby each debtor's constitutional rights devole ultimately upon the fortuity of the debtor's state of residence.

The Supreme Court is only bound by a state court decision on questions of local law that avoids, rather than raises, a constitutional issue. *Zwickler v. Koota,* 389 U.S. 241, 248-49 (1967); *Chicago v. Fieldcrest Diaries,* 316 U.S. 168 (1942); *Juidice v. Vail,* ____U.S.____, 51 L.Ed.2d 376, 391 (March 22, 1977) (Stewart, J., dissenting).

Respondents' reliance upon *Reitman v. Mulkey,* 387 U.S. 369 (1967), for this Court's deferral to *Blye* is misplaced. The rule of *Reitman* is that the state involves itself in private racial discrimination in housing by giving it a preferred status through a state constitutional amendment that wipes out fair housing laws and bars minorities from obtaining redress for discrimination and from the political processes through which to obtain a change in the law. *Evans v. Abney,* 396 U.S. 435, 457 (1970) (Brennan J., dissenting); *Davis v. Richmond,* 512 F.2d 201, 203 n. 4 (1st Cir. 1975).[4] This limited holding was compelled by the history, objectives and effects of California's State

4. This same intrusion of governmental power and prestige backing authorized private conduct by the repeal of inconsistent laws, leaving aggrieved parties no alternatives or remedies against the authorized activity, distinguishes the enactment of N.Y.U.C.C. §7-210 from the Railway Labor Act amendment upheld in *Railway Employees' Dept. v. Hanson,* 351 U.S. 225 (1956). *See Davis v. Richmond, supra,* 512 F.2d at 203 n.4. For the requirement of state "power property and prestige" supporting ostensibly private activities, *see Gilmore v. City of Montgomery,* 417 U.S. 556, 574 (1974).

constitutional amendment which the California Supreme Court had undertaken to examine, "armed as it was with the knowledge of the facts and circumstances." *Reitman v. Mulkey, supra,* 387 U.S. at 378. Hence, the Supreme Court determined that it was unnecessary to reassess these matters, although it acknowledged twice that it had "frequently undertaken" such judgments itself, and also because it was a provision of the California Constitution that was construed, as opposed to a statute. Neither reason for the Supreme Court's deferral in *Reitman* is present in the New York Court of Appeals' superficial one-paragraph examination of the innkeeper's lien law in *Blye.*

C. *Civil Rights Cases,* 109 U.S. 3 (1883).

In the Civil Rights cases the Supreme Court held that Congress had exceeded its power in enacting a statute under the Fourteenth Amendment providing civil and criminal redress against owners of inns and hotels, theaters and railroad companies for denying Negroes full and equal enjoyment of such accommodations, guaranteed to them under the statute. The Supreme Court has never interpreted this case as holding state legislative action in conferring an individual right arguably in violation of another individual's constitutional right to be sufficient state action for purposes of the Fourteenth Amendment and §1983. More fundamentally, the passage of a statute allowing a private party to deny due process to another private party does not violate the latter's due process right because that right is only assertable against the actions of the state. The enactment would implicate the state only if it authorized the state acting through any of its officials,[5] or

5. It is not just the mere participation of minor government officials that supplied the requisite state involvement in the Supreme Court's quartet of economic due process cases cited by respondents, but the fact that the creditors there invoked the governmental procedures of court processes to assist them in their collection efforts, not relying on "self-help." *Fuentes v. Shevin,* 407 U.S. 67, 79 n. 12 (1972) makes clear that the Fourteenth Amendment applied because self-help did not and that state action and self-help are indeed mutually exclusive concepts.

through any "arrangement, management, funds or property," *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970), *Burton v. Wilmington Packing Authority,* 365 U.S. 715, 722 (1961), not to accord due process in its dealing with private individuals. Limitation upon the federal government's reach should not be read out of the Constitution:

> "We are not here confronted with a question of the extent of the powers of Congress but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is as heretofore noticed the help found in the (necessary and proper) clause of (Art. I, §8), and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

Fairbank v. United States, 181 U.S. 283, 288-89 (1901).[6]

II.

A WAREHOUSEMAN'S RIGHT OF SALE PURSUANT TO N.Y.U.C.C. §7-210 IS NOT A FUNCTION OF SOVEREIGNTY WITHIN THE MEANING OF *JACKSON V. METROPOLITAN EDISON COMPANY*, 419 U.S. 345 (1974).

A. Neither in procedure nor effect is a warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210, Subd. 2 equivalent to the function performed by a sheriff in New York State executing upon a judgment.

Respondents cite common law authorities in support of their characterization of N.Y.U.C.C. §7-210 as permitting a warehouseman to do that which, were it not for the statute, the sheriff would have to do in order for the warehouseman to collect his charges from a defaulting depositor. Careful analysis of the relevant facts and circumstances, however, clearly shows that neither in procedure nor effect is a warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210, Subd. 2 equivalent to the function performed by a sheriff in New York State in executing upon a debt reduced to judgment.

Under Article 52 of the New York Civil Practice Law and Rules governing enforcement of money judgments, the sheriff performs the following steps: (1) receives an execution from an authorized officer or court clerk directing him to satisfy the judgment out of the debtor's real or personal property, §5230(b); (2) "levies" upon the debtor's personal property, upon property

6. To the extent the Court reads *McCabe v. Atchison, T. & S. F. Ry.*, 235 U.S. 151 (1914), to hold that passage of a permissive law might constitute *ipso facto* sufficient state involvement, petitioners point out that this case is distinguishable as involving race discrimination.

not capable of delivery by serving a copy of the execution, §5232(a), upon property capable of delivery by seizing it and taking it into custody, §5232(b); (3) holds the seized property in impound, pending sale; (4) sells the property, §5233; (5) makes return of execution showing the extent of the judgment's satisfaction, §5230(c), (d).

In contrast, only one of the above steps, the actual sale itself, is comparable to what the warehouseman does under N.Y.U.C.C. §7-210. Steps (l) to (3) of the sheriff's procedure are not involved, since the warehouseman already has possession voluntarily conveyed to him under the bailment agreement. The warehouseman does not need to resort to seizure, unlike a landlord under a distress for rent statute or a repossessing secured creditor under Article 9 of the Uniform Commercial Code.[7] Moreover, the warehouseman's lien foreclosure statute imposes at least five procedural steps of which not one finds it counterpart in the sheriff's execution. *See* Point I, *supra*, n. l.

Thus, the only procedural similarity between a sheriff's sale and a warehouseman's lien foreclosure sale is the tautological fact that both involve sales. Since at least *Evans v. Newton*, however, it has been constitutional law that the mere fact that a private party performs a function duplicated by state government is not state action:

> "The range of governmental activities is broad and varied, and the fact that government has

7. Under distress for rent in England, sale is a private remedy not available to the government to collect taxes or local assessments. 13 Halsbury's Laws of England, "Distress", §§ 291, 309-310, 333-341, 397-421, 434-441 (4th Ed. 1975). The private right of summary sale of distrained personalty has existed in England by statute since the Distress for Rent Act of 1689. 2 Wm. & Mary, Second Sess., Ch. V (1689).

> engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions." *Evans v. Newton*, 382 U.S. 296, 300 (1966).

In a very realistic sense, the argument for state action herein is weaker than the performance of duplicating public functions that the Supreme Court laid to rest in *Evans v. Newton*. Above and beyond the procedural differences already indicated, there is a greater dissimilarity between sheriff's sales and warehouseman's sales which demonstrates that the two types of sales are not duplicative. The specific lien sale procedure under attack is Subdivision 2 of N.Y.U.C.C. §7-210, applicable to household goods. U.C.C. Official Comment 1. Household goods warehousemen such as petitioners have been allowed to sell household goods to satisfy their storage charges since at least 1879 (Brief for Petitioners, at 8-11). The same cannot be said for the sheriff. Whatever can be generalized about the function of the sheriff to enforce liens in New York, it is a fact that since at least 1842 the sheriff has not been permitted to levy upon and sell "household furniture" in satisfaction of a judgment lien. *See* Ch. 157 (1842) N.Y. Laws 193.[8] This is pursuant to the New York statutes exempting personal property from satisfaction of money judgments, which the Supreme Court took cognizance of as recently as *United States v. Kras*, 409 U.S. 434, 438, 495 n. 6 (1973).

Thus, far from being a traditionally exclusive governmental function, or even a function duplicative of the sheriff, a warehouseman's right to sell another's household goods to

8. This early exemption statute was replaced by Ch. 448, §§1390, 1391 and 1392 (1876) N.Y. Laws 269-270 and by Ch. 416 (1877) N.Y. Laws which recodified the exemption law within the Code of Civil Procedure, assuming its present form. See C.P.L.R. §5205(a).

satisfy a debt is a function that only a warehouseman has been able to perform.[9] *See Melara v. Kennedy*, 541 F.2d 802 (9th Cir. 1976); *accord, Smith v. Bekins Moving and Storage Co.*, 384 F. Supp. 1261 (E.D.Pa. 1974). In the last analysis, the household goods warehouseman's right of summary sale is an exclusive function of household goods warehousing, not of sovereignty. *Cf. Parks v. "Mr. Ford", supra*, 536 F.2d at 139.

Blackstone in his Commentaries lists six forms of self-help available to a private party at common law. At least four of them involve a seizure and/or detention and at least as many require entry upon the debtor's land. Blackstone, *Commentaries on the Laws of England*, Book III, §§7-12 (Jones Ed.). These are all analogous to private possessory liens consistently upheld as not involving state action, *Parks v. "Mr. Ford", supra; Phillips v. Money*, 503 F.2d 990 (7th Cir. 1974), and to repossession under Article 9 of the U.C.C. also consistently upheld, *Gibbs v. Titelman*, 502 F.2d 1107 (3d Cir.), *cert. denied sub nom. Gibbs v. Carver*, 419 U.S. 1039 (1974); *Shirley v. State Nat'l Bank*, 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); *Adams v. Southern Calif. First Nat'l Bank*, 419 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). *A fortiorari*, if these private remedies, which more closely resemble the sheriff's characteristic function as the strong right arm of government, are not considered state action, then analytically neither is a private sales remedy which bears even less resemblance than possessory remedies to a sheriff's function. Stated another way, if sale by a warehouseman is state action as the delegation of a sheriff's function, then so must be all distress and detainer remedies authorized at law, all private rights of self-defense, citizen's arrest, and the utility cut-off upheld in *Jackson v. Metropolitan*

9. If the warehouseman's right of sale is struck down, then the warehouseman could not collect his charges from the stored goods, since the sheriff could not levy upon the goods in storage to satisfy a judgment. This would be especially detrimental if the storage lot is abandoned and cannot be liquidated to make room for new accounts.

Edison Co., supra, all more sheriff-like in their procedures and in their drastic finality than a warehouseman's sale.[10] To paraphrase Mr. Justice Douglas, concurring in *Boddie v. Connecticut,* 401 U.S. 371, 383, 385 (1971): "I do not see the length of the road we must follow if we accept (respondents') invitation."

B. A warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210, Subd. 2 is not a form of binding conflict resolution.

1. The exclusivity element is missing.

Petitioners in their initial brief took issue with the Second Circuit's characterization of the warehouseman's right of sale as a delegation of the sovereign function of "binding conflict resolution," a concept to which the Supreme Court gave controlling expression in *Boddie v. Connecticut,* 401 U.S. 371 (1971). Petitioners contend that the "exclusivity" element stressed in *Boddie* was crucial to that case and rendered its holding and rationale inapplicable to the resolution of creditor-debtor disputes.

Petitioners' reliance upon nonexclusivity of state control over warehouseman-depositor disputes as a controlling distinction between *Boddie* and *Jackson* is reinforced by the Supreme Court's decision in *United States v. Kras,* 409 U.S. 434 (1973), holding that the federal bankruptcy court's refusal to discharge an indigent voluntary bankrupt for inability to pay the bankruptcy court fees does not violate the bankrupt's due process or equal protection rights. *Boddie* was distinguished as a

10. As stated in Point I above, if the warehouseman sells in bad faith to one other than a bona fide purchaser, then the sale is not final as to the depositor and he may replevy his property. And see n.2 above on statutory procedures codifying the depositor's common law remedies, which did not include replevy from a third party purchaser. 2 F. Pollack and F. Maitland, *A History of English Law* 169-179 (2d ed. 1959).

narrow ruling that rested upon the exclusivity of access to court as the sole means of dissolving marriage and preserving associational interests, as opposed to the government's non-exclusive control over the dissolution of debts. "However unrealistic," it might seem, the Court said, a distressed debtor does have other remedies to choose from besides resort to court, specifically mentioning negotiating an agreement with his creditors or entering other private arrangements.

Respondents attempt to meet the exclusivity element of a "binding conflict resolution" characterization, manifestly not present in the commercial transactions area, by asserting state monopolization of the various nonconsensual forms of conflict resolution, one of which, assertedly, forced sale, has been delegated to the warehouseman through N.Y.U.C.C. §7-210 (Brief for Respondents at 27-28). Adding nonconsensuality into the picture, however, only befuddles the issue without supplying the missing exclusivity.

For example, compulsory arbitration is common in New York, both under law[11] and as a result of enforcement of arbitration clauses in contracts which one side refuses to honor. *See* N.Y.C.P.L.R. §7501; *comp.* 9 U.S.C.A. §§1 *et seq.* (Federal Arbitration Act, 61 Stat. 669 (1947)); *see also A/S J. Ludwig Mowinckels Rederi v. Dow Chemical Co.,* 25 N.Y.2d 576, 307 N.Y.S.2d 660 (1970), *cert. denied,* 398 U.S. 939. If a reneging party is forced to arbitrate by a court order enforcing the arbitration agreement, then, according to respondents, the arbitration is no longer private but becomes a species of state

11. *E.g.,* Ch. 892, §12 (1977) N.Y. Laws, eff. 12/1/77 (amending New York Comprehensive Automobile Insurance Reparations Act (No Fault Law), N.Y. Insurance Law §§670 *et seq.,* to require mandatory arbitration of disputes between motor vehicle insurance carriers concerning their relative responsibility to pay first-party benefits). *See also* N.Y. Judiciary Law §213, subd. 10 (McKinney, main vol. at 453 and pocket supp. 1977-78 at 94) (describing system of compulsory arbitration of claims for money only up to $6,000, to be promulgated by court rule).

action in the form of binding, nonconsensual conflict resolution, giving rise to a potential due process right of the reneging party to judicial control over the dispute's resolution. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). The injection of the nonconsensuality element cancels out the arbitration agreement.

There are further anomalies. N.Y.C.P.L.R. §4522 denies admissibility into evidence of a printed contract covering a consumer transaction containing an arbitration clause where the print is in less than eight-point type.[12] The parties would not be legally bound by an agreement in lesser type and in such event the warehouseman's resort to summary sale would be construed as nonconsensual, and a function of sovereignty subject to due process strictures. The application of the Constitution, thus, would turn on the nicety of the size of print of an agreement to arbitrate. The Due Process Clause was not meant to draw such fine lines. *North Georgia Finishing Co., Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *comp. Brooks v. Flagg Bros., Inc.*, 554 F.2d 764 (April 7, 1977), *cert. granted*, ___ U.S. ___, 46 U.S.L.W. 3215 (Oct. 4, 1977) (A159a, 165a and n.3).

Normally, a moving and storage contract and warehouse receipt contain provisions for a lien and sale to satisfy unpaid charges (A109a-111a, 113a-114a).[13] In the absence of an express agreement, it is well settled in New York that a statute that

12. This plainly consumer-oriented statute refutes the amici's imputation of an anti-consumer bias to New York's legislature. *See also* Ch. 747 (1977) N.Y. Laws 1215 (Eff. June 1, 1978) (plain language law). In the absence of such a policy or state-enforced custom, cases such as *Robinson v. Florida*, 378 U.S. 153 (1963), have no application to the state action question.

13. These provisions are:

> Contract: "2. PAYMENT: Storage payments are due and payable monthly in advance. . . . The company has a lien on all goods moved or stored to secure payment for charges for all services rendered. . . ."

(Cont'd)

affects a contractual relationship is as much a part of the parties' express undertaking as though it were spelled out in writing. *Dolman v. United States Trust Co.*, 2 N.Y.2d 110, 116, 130 N.E.2d 764, 157 N.Y.S.2d 539, 541-42 (1956); *Strauss v. The Union Central Life Ins. Co.*, 170 N.Y. 349, 356, 63 N.E. 347 (1902); 10 N.Y. Juris., "Contracts" §204. This implied contract term doctrine is a legal fiction, but it is just as much a fiction to infer actual consent of the average depositor of household goods to the extrajudicial sale of the deposited goods from the fact that provisions for sale are expressly contained in the storage agreement. *See Melara v. Kennedy, supra* (Choy, J., dissenting).

2. The requirement of an impartial third-party judge is missing.

One of the purposes of the sovereign is to resolve disputes between its subjects:

> ". . . In the State of Nature there wants a *known and indifferent Judge*, with Authority to determine all differences according to the established Law. For every one in that state being both Judge and Executioner of the Law of Nature, Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases; as well as negligence, and unconcernedness, to make them too remiss, in other Mens."

(Cont'd)

> *Warehouse Receipt:* "2. PAYMENT (a): It is agreed that the company shall have a general lien upon any and all property deposited with it. . . . All goods deposited upon which storage and all other charges are not paid when due will be sold at public auction to pay said accrued charges. . . ."

J. Locke, *Two Treatises of Government* par. 125, in P. Hastell (Ed.) (Cambridge: The University Press 1960) at 369. (Emphasis is in translation edition.)

Locke's emphasis upon an "indifferent" judge resolving disputes, which he repeats later in the tract, *id.*, at 371, is deliberate, and reveals an inherent fallacy of the "binding conflict resolution" theory of state action in this case. *See* F. Pollack, *Essays on the Law* 94 (1922). The function of sovereignty is to resolve disputes impartially through an "indifferent Judge,", *i.e.*, one not having a vested interest in the outcome. That function cannot be delegated to one of the parties to a dispute, for it would destroy a necessary element characterizing the function as governmental: the impartiality of the dispute-resolver.

3. A warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210 is not an exercise of a function of sovereignty.

The Third Circuit in *Parks* listed the public functions which the Supreme Court has associated with the traditional exercise of sovereignty, including eminent domain, *Jackson v. Metropolitan Edison Co., supra,* power to control the electoral process, *Nixon v. Condon,* 286 U.S. 73 (1932); regulation of streets and sidewalks, *Marsh v. Alabama,* 326 U.S. 501 (1946) and maintenance of public parks, *Evans v. Newton, supra; Parks v. "Mr. Ford", supra,* 556 F.2d at 139. To this list of distinctly governmental powers may be added the formation and dissolution of marriage, *Boddie v. Connecticut, supra,* the police power to make rules, regulations or findings to facilitate the administration of the law or to protect the general health, safety and welfare of the public, *East New York Savings Bank v. Hahn,* 326 U.S. 230, 232 (1945).[14]

14. *See also* enumeration found in the "Statutes" chapter of McKinney's Con. L. of N.Y. Ann. (West 1971) at §3, pp. 26-28: granting franchises, enacting local laws, enacting zoning ordinances, controlling public utility rates, regulation and control of alcoholic beverages, granting and resolving trade and professional licenses, *see* N.Y. Edu. L. Tit. VIII (McKinney 1972).

The Third Circuit held in *Parks* that all these functions, however they may be defined, are qualitatively different from the exercise by a garageman of a possessory lien securing his charges. No less is true of a right of sale to secure a creditor's charges such as the warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210.

The State of New York has no obligation to resolve creditor-debtor disputes, in light of the traditionally private dispute-resolving alternatives available, *Jackson v. Metropolitan Edison Co., supra,* 419 U.S. at 353; *United States v. Kras, supra,* 409 U.S. at 445; E. Johnson, V. Kantor and E. Schwartz, *Outside the Courts: A Survey of Diversion Alternatives in Civil Cases* (National Center for State Courts 1977). Nor can it be said that, in the mind of the ordinary citizen, the auction sale of encumbered belongings is traditionally identified with the state, the same as the calling out of the state militia to quell a riot. *Gilmore v. City of Montgomery, supra,* 417 U.S. at 582 (White, J., concurring); *Jackson v. Metropolitan Edison Co., supra,* 419 U.S. at 365, 371 (Marshall, J., dissenting); N.Y.Const. Art. 4, §3; *Grafton v. Brooklyn Law School,* 478 F.2d 1137, 1143 (1973).

SUMMARY AND CONCLUSION

A careful sifting and weighing of the facts and circumstances of this case leads inevitably to the conclusion that the warehouseman exercising his right of sale under N.Y.U.C.C. §7-210 (1) is not performing a traditional function of the sheriff, (2) is not engaged in binding conflict resolution, (3) is not performing an essential function of sovereignty.

Respondents and amici assert that state action should nevertheless be found because, if the state performed the challenged activity, there would be a denial of warehouse storage depositors' due process rights. Such a proposition would, to borrow a phrase from Mr. Justice Brennan, stand the Bill of

Rights on its head, reading out of it completely the state action limitation upon the power of Congress and the federal judiciary to oversee creditor-debtor affairs between private parties. *Juidice v. Vail, supra,* 51 L. Ed. 2d at 388, 389 (Brennan, J., dissenting). Subjective views of Fourteen Amendment "values" as providing a needed solution to the "harsh" plight of depositors who are "at the unsupervised mercy of the warehouseman," under §7-210's accommodation of creditor-debtor interests, cannot change the result, *Shelley v. Kraemer,* 334 U.S. 1, 14 (1948); *Lindsey v. Normet,* 405 U.S. 56 (1972); *Dandridge v. Williams,* 397 U.S. 471, 485 (1970); *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949); *Krueger v. Wells Fargo Bank,* 11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Rptr. 449, 452 (1974). The "state action" requirement, if it means anything, means that the Fourteenth Amendment has no application to the facts of this case.

The judgment of the Second Circuit Court of Appeals should be reversed and the case remanded with instructions to dismiss the complaint.

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